No. 12,735

IN THE

United States Court of Appeals

For the Ninth Circuit

H. L. JONES, individually and doing business under the style and trade name of Standard Seed Farms Company,

Appellant,

vs.

THE BARTELDES SEED COMPANY (a corporation),

Appellee.

APPELLANT'S PETITION FOR A REHEARING.

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Attorneys for Appellant and Petitioner.

Table of Authorities Cited

Cases

Texts

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To the Honorable William Denman, Chief Judge, and to the Honorable Associate Judges of the United States Court of Appeals for the Ninth Circuit:

H. L. Jones, the Appellant in the above entitled cause, respectfully petitions for a rehearing in order that further consideration be given to certain legal principles upon which the opinion rendered in this cause is predicated.

The Appellant urges that a rehearing is justified in this cause on the following grounds:

I.

The trial Court erroneously stated the facts. The opinion herein contains the following:

> "The Appellant, a grower and seller of vegetable seeds, with his principal place of business located in Stockton, California, sent his customers a 'Surplus List', showing the seeds he had in stock and the prices asked. Attached to the 'Surplus List' was a blank form of contract of sale."

The Court's statement of facts in this matter is clearly shown to be erroneous by referring to Plaintiff's Exhibit No. 7 which was printed on page 113 of the transcript of record.

In the oral argument before this Court, the counsel for the Appellee urged the Court that two documents were sent out—a Surplus List and a Contract of Sale. Because it is difficult for this Court to ascertain from the transcript of record the precise form this "Surplus List" was sent out in, we are attaching hereto a photostatic copy of the "Surplus List" for the Court's inspection. The Court will note that there is no attached contract, but in reality there was only one form submitted on one page with printing on one side, offering certain onion seeds for sale.

The Court, in its opinion, does not seem to have a clear understanding of just exactly what a "Surplus List" is.

The "Surplus List" used by the Appellant was in the form of a contract to grow vegetable seeds. When the Appellant stamped the contract to grow

seeds, with the words "Surplus 1943 Crop", he changed this form from a Contract of Sale into a price list. On page 42 of the transcript of record, we find the following:

"Q. Mr. Jones, I am going to show you this photostatic copy which you were shown on direct examination. I believe it is a photostatic copy of Plaintiff's Exhibit No. 7. Isn't this, Mr. Jones, just a form of printed contract which you were then using under the terms of which you agreed to grow seeds for various purchasers?

A. That is correct, modified by the words 'Surplus 1943 Crop'. If you put the word 'Surplus' on there, it is not an agreement to grow.

Q. In other words, in this particular case, in lieu of furnishing a regular price list, you used one of your contract forms, and distinguished it by putting the word 'Surplus' on it. Is that right?

A. It amounts to the same thing.

Q. It wasn't exactly the same, was it, as your usual price list?

A. It is about the same as my usual price list.

Q. Well, do you use this all the time as a price list?

A. Yes.

Q. I believe you testified on direct examination that 3200 pounds was the total of your crop of yellow globe Danver onions grown or in the warehouse at the particular time that you made your sale to the Barteldes Seed Company?

A. As near as I can recall, that was the testimony and that was the fact."

Mr. Stubbs, the manager of Barteldes Seed Company, who entered into this contract with the Appellant, was in the seed business for at least twenty-five years at the time of the making of this contract. The Court will note, in referring back to Mr. Stubbs' testimony on pages 48 and 49 of the transcript of record, that Mr. Stubbs speaks of the document he received from the Standard Seeds Farm Company as a "Surplus list". The fact that he wasn't confused as to the nature of a "Surplus List" is shown by the fact that he immediately called the Appellant on long distance telephone and offered to buy seeds that were offered for sale for immediate delivery. This is also shown in the various exhibits in the transcript of record confirming the sale "For Prompt Shipment". It is the contention of this Appellant that the "Surplus List" was definitely within the area negotiated and was covered by the telephone conversation which formed this contract, and that the purchaser knew, or should have known, that the provisions of the "Surplus List", disclaiming liability for Breach of Warranty in the description of the onion seeds was truly applicable to this sale. The law covering the application of the usual seedman's disclaimer has been stated at greater length on page 12 to page 19 of the Appellant's Opening Brief.

The Court will note that the disclaimer sent out in the Surplus List read as follows, "Except as *herein* otherwise expressly provided * * *", after which came the usual seedman's disclaimer.

The Court then reasoned that the disclaimer provided for exceptions to the non-warranty provisions and the words uttered concerning variety by the *Appellee* to the *Appellant* constituted such an exception on the part of the Appellant. This is clearly erroneous. The disclaimer can only be interpreted to mean that unless a definite warranty were given in the surplus list itself, then no warranty would be given.

II.

The opinion of this Court stated that,

> "Disagreement existed between counsel for appellant and appellee as to whether the law of California or that of Colorado should be applied in construing the contract. We think it immaterial because both California and Colorado have adopted the Uniform Sales Act, which, in our opinion, governs the transaction in issue here".

The Appellant notes that this is a unique statement of the law, and is not backed by any citation of authority. We submit to the Court on this issue the following authorities:

Federal Courts, in diversity of citizenship cases, are governed by the conflict of laws rules of the Courts of the states in which they sit.

Griffin v. McCoach (Texas, 1941), 61 S. Ct. 1023, 313 U.S. 489, 85 L. Ed. 1481, 134 A.L.R. 1462.

> "Where jurisdiction of a Delaware Federal Court was based on diversity of citizenship, the

> Supreme Court's views were not the decisive factor in determining the applicable conflicts rule, and the proper function of the Del. Federal Court was to ascertain what the state law was and not what it ought to be."
>
> *Klaxon Co. v. Stentor Elec. Mfg. Co.* (Del., 1941), 61 S. Ct. 1021, 313 U.S. 47, 85 L. Ed. 1477.

This Court has before it a case of diversity of citizenship, and following the law laid down by the authorities above quoted, the trial Court should have necessarily found, as a matter of fact, that the California conflict of law rules apply to the facts here presented. That the California substantive law applied to whether or not there was a failure in the performance of the contract.

We respectfully submit to this Court that this was a material issue in the case, that a finding of fact should have been made on this issue and there not being such a finding of fact was prejudicial error to the Appellant.

III.

The decision erroneously states that an express warranty of description arose when the Appellant assured the Appellee the seeds were of first-class quality and of high germination. The uniform sales act defines an Express Warranty as "any affirmation of fact or any promise by the *seller* relating to the goods * * *".

In searching the transcript of record, we fail to find, even in the Appellee's testimony, any assurance made by the *Appellant* that the goods were true to type. Let us, for the sake of argument, assume that the Appellant had given an Express Warranty. Even then the Court in its opinion apparently did not consider the authorities directly on this issue, where a disclaimer of warranty is involved. The law on this subject has been set out in detail in Vol. 160, American Law Reports, page 360, and we respectfully request this Court that it consider these authorities.

One of the later cases involving the sale of seeds and dealing with a disclaimer clause is *Belt Seed Company v. Mitchellhill Seed Company,* 153 SW 2nd, 106. The Defendant wired the Plaintiff offering to sell grass seed of special weight and 77% purity and 80% germination. The Plaintiff wired the Defendant accepting a certain amount of the seed so quoted. The Defendant, on the day of the receipt of the telegram, accepting the offer of sale, confirmed the sale by letter on which letterhead was printed the Standard Seedman's Disclaimer, that the Defendant gives no Warranty, express or implied, as to description, quality or productiveness of any of the seeds it sends out, and will not be in any way responsible for the crop. The basis of the plaintiff's action was Breach of Warranty in that the seed did not test 80% germination. The Defendant appealed the adverse Judgment in the law Court, and the Appellate Court ruled in favor of the Defendant. The questions raised in this case

were substantially the same as the questions raised in the case at bar. The Court held the following:

> "So far as we are able to ascertain the authorities are unanimous in holding that, where the word 'warranty' or its equivalent does not appear in the contract, but there is some language appearing in it and it, and the surrounding circumstances, standing alone, might give rise to an inference merely that a warranty was intended, such inference cannot be drawn in the face of positive and explicit language in other parts of the contract showing that no warranty was given or intended, such as contained in the non-warranty provisions in the defendant's confirmation of sale and the letter of November 15th, 1927. Davis v. Bertrand Seed Co., 94 Cal. App. 281, 271 P. 123; Leonard Seed Co. v. Crary Canning Co., 147 Wis. 166, 132 N.W. 902, 37 L.R.A., N.S., 79, Ann. Cas. 1912D, 1077; Seattle Seed Co. v. Fujimori, 79 Wash. 123, 139 P. 866; Larson v. Inland Seed Co., 143 Wash. 557, 255 P. 919, 62 A.L.R. 444; Ross v. Northrup, King & Co., 156 Wis. 327, 144 N.W. 1124; Reynolds v. Binding-Stevens Seed Co., 179 Okl. 628, 67 P.2d 440; Manglesdorf Seed Co. v. Busby et al., 118 Okl. 255, 247 P. 410; Blizzard Bros. v. Growers' Canning Co., 152 Iowa 257 257, 132 N.W. 66; Miller v. Germain Seed & Plant Co., 193 Cal. 62, 222 P. 817, 32 A.L.R. 1215. 'Parties may by an express provision in the contract exclude any warranty as to kind from being imported from words descriptive of the kind of seed sold.' 24 R.C.L. p. 176.

> The question of whether a representation is a warranty depends on its having been affirmed as a fact; it must have been understood by the parties as having that character, it must be positive and unequivocal and not merely a vague, ambiguous, and indefinite statement of the seller regarding the property. A representation of fact made to induce the sale, and to be relied on, and which is relied on by the buyer, is a warranty unless accompanied by an express statement that it is not so intended, at least if the representation is understood by the parties as an absolute assertion. 55 C.J. pp. 677, 678, 679, 680. See, also, 24 R.C.L. pp. 164, 165. We are of the opinion that, under all of the circumstances, the statement by defendant that the seed would germinate 80% was merely the expression of an opinion. Davis v. Bertrand Seed Co., supra, 94 Cal. App. 281, 271 P. loc. cit. 126."

The Court will note that as the main authority for the ruling of the Judgment in this case the Court has repeatedly cited *Davis v. Bertram Seed Company,* 94 C.A. 281. We have constantly urged that the law of the State of California covers this transaction and by the law of the State of California, the defendant was not liable for Breach of Warranty.

In conclusion, the Appellant respectfully requests the Court that it correct its erroneous statement of facts set forth in its opinion to show that there was only one paper sent out and that was a Surplus List, and that on the Surplus List was printed a Disclaimer,

which negatived any statement that the seller, a seedman for twenty-five years, would feel would be a Warranty.

Dated, Stockton, California,
November 16, 1951.

Respectfully submitted,
James I. Harkins,
Albert E. Cronin, Jr.,
Attorneys for Appellant and Petitioner.

CERTIFICATE OF COUNSEL.

I, Albert E. Cronin, Jr., one of counsel for Appellant, hereby certify that in my judgment the foregoing petition is well founded and that it is not interposed for the purpose of delay.

Dated, Stockton, California,
November 16, 1951.

ALBERT E. CRONIN, JR.,
Of Counsel for Appellant and Petitioner.

24 pkgs 10pt + Plaintiff's Exhibit No. 7

OCT. 18 1943

THIS AGREEMENT, made in duplicate on _____, 19 __, by and between the **Standard Seed Farms Company,** Seed Growers of Stockton, California, hereinafter called the Seller, and _____ hereinafter called the Purchaser

WITNESSETH 1. Seller agrees to sell and deliver and purchaser agrees to accept and pay for the varieties of seeds in the amounts, at the prices as set forth below, and subject to the terms and conditions herein provided

2. Seller agrees to plant, or cause to be planted, during the season of 19__, an acreage of land which will produce, under normal conditions, an amount of seed of the varieties herein named which will be sufficient to enable the Seller to deliver the quantities of the seeds herein contracted for; and the Seller agrees to deliver as soon as possible after harvest, such seeds in good merchantable condition, as herein defined, F.O.B. growing station, containers extra at cost, and not returnable. The term "in good merchantable condition" is defined as seeds properly cleaned for seeding purposes, approximately free from foreign seeds distinguishable by their appearance and of a germination equal to the fair average germination of the crop of the current year.

3. In case of partial or total failure of any or all crops planted for the purpose of producing the varieties of seeds herein named, or, in case of damage to any seed through fire, accident or other casualty beyond Seller's control, the Seller shall be obligated to deliver, if at all, proportional quantities only.

4. Purchaser shall make payment for seeds delivered, by a trade acceptance due and payable 60 days from date of shipment, or by cash within 30 days from date of shipment, less a discount of 1½%

If at any time, the financial condition of the Purchaser becomes unsatisfactory to the Seller, the Purchaser agrees upon receipt of written notice to that effect, and upon demand of the Seller, to pay for the seeds in advance of shipment, less a cash discount of 1½%, and if such payment is not made within ten (10) days from the receipt of such demand for payment, this agreement shall thereupon be deemed to be breached by the Purchaser

5. Except as herein otherwise expressly provided, the Seller gives no undertaking or warranty, express or implied, as to description, quality, productiveness or any other matter of any seeds sold by it and will not be in any way responsible for the crop.

6. Purchaser's claims for shortages or deliveries must be made to Seller immediately on receipt of shipment and all germination tests must be made and reported in writing (including telegrams) by Purchaser to Seller within 15 days after receipt of shipment.

IN WITNESS WHEREOF, the parties have hereunto set their hands on the day and year first above written

Standard Seed Farms Company
The Seller

By

OFFERS made subject prior sale.

QUANTITY	PRICE PER POUND
BEET	
Crosby's Egyptian	
Crimson Globe	
Detroit Dark Red Turnip	
Early Blood Turnip	
Edmand's Blood Turnip	
Extra Early Kellese	
Extra Early Flat Egyptian	
Early Wonder	
Mangels Danish Sludstrup	
" Giant Intermediate	
" Giant Long Red	
" Half Sugar Rose	
" Golden Tankard	
CARROT	
Bunching, special	
Chantenay	1.40
Chantenay red core	
Danvers Half Long	
Early Scarlet Horn	
Imperator	1.40
Improved Short White	
Improved Long Orange	
Nantes, coreless	
Oxheart	
Red St Valery	
Yellow Belgian	
CELERY	
Golden Self-Blanching, Tall	
Golden Self Blanching, Dwarf	
White Plume	.75
Giant Pascal	.75
Utah, green	
Celeriac smooth Prague	
ENDIVE	
Broad Leaved full hearted batavian	
Curled Leaved Green	
Curled Leaved White	
Pancalier, pink rib	
LETTUCE	
Big Boston, w s	
Black Seeded Simpson, h s	1.00
Denver Market, w s	
Early Curled Simpson, w s	
Grand Rapids, h s	
Hanson, w s	
Hubbard's Market, w s	
Iceberg, w s	1.10
May King, w s	
New York, w s, all types	
" " Special	
" " Number 12	
" " Imperial, all types	
Salamander, h s	
Prize Head, w s	1.00
Paris White Cos, w s	
Silesia Early Curled, w s	
White Boston	
LEEK	
American Flag	

QUANTITY	PRICE PER POUND
MUSTARD	
Chinese Broad Leaf	
Giant Southern Curled	
Fordhook Fancy	
Ostrich Plume	
ONION	
Alisa Craig	
Australian Brown	
Ebenezer	3.00
Early Red Flat	2.85
Early Yellow Globe Clarks	3.00
Ohio Yellow Globe	
Prizetaker	
Red Wethersfield	
Southport Red Globe	3.00
Southport White Globe	
Southport Yellow Globe	3.00
Sweet Spanish, Valencia	
Sweet Spanish, Riverside	
Sweet Spanish, White	
White Lisbon Crimson Danvers	2.65
White Portugal	
White Silver Skin	
Yellow Flat Danvers	3.00
Yellow Globe Danvers	
Yellow Dutch, or Strasburg	
Early Red Semi Globe	2.85
PARSLEY	
Moss Curled	
Plain Leaved	
Turnip Rooted Hamburg	
PARSNIP	
Half Long Guernsey	
White Hollow Crown	
RADISH	
China Rose	.35
Crimson Giant	
Early Scarlet Turnip	
French Breakfast	.35
Icicle	
Long Scarlet Short Top	
Long Brightest Scarlet	
Scarlet Globe (Vicks)	.35
Sparkler, Half White	
White Tipped Scarlet Turnip	
White Vienna	
SALSIFY	
Mammoth Sandwich, Island	
SWEET PEAS	
Eckford Mixed	
Spencer Mixed—Select	
SWISS CHARD	
Lucullus	
White Ribbed, Smooth.	

Our time and equipment is devoted exclusively towards developing and improving standard types of vegetable seeds as used by market garden and shippers' trade.

SHIPMENT RAIL OR WATER

MEMORANDUM

Standard Seed Farms Company

STOCKTON, CALIFORNIA

CONTRACT PRICE LIST

VEGETABLE SEEDS

SEASON OF

OCT. 1 1943

SURPLUS

1943 CROP

CABLE ADDRESS STANSEED

POST OFFICE BOX NO. 874